MINNESOTA

January 11, 2019

David P. Ross, Assistant Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Section 404 Assumption Rulemaking

Dear Assistant Administrator Ross,

Thank you for the opportunity to provide early input to the U.S. Environmental Protection Agency (EPA) regarding updates the Federal Clean Water Act Section 404 assumption regulations (40 CFR 233). We appreciate EPA's efforts to update the regulations and facilitate state assumption of the Section 404 program where that is the desire of a state.

Over the last several years, the State of Minnesota has invested a significant amount of time and effort analyzing the feasibility of 404 Assumption in our state. In January 2017, the Minnesota Department of Natural Resources (DNR) and the Board of Water and Soil Resources (BWSR), in cooperation with the Minnesota Pollution Control Agency (PCA), completed a report to the State Legislature that studied the feasibility of the State assuming administration of the Clean Water Act Section 404 permitting program (404 assumption) in Minnesota. In May 2018, the agencies completed a mapping analysis of retained and assumable waters in Minnesota based on information provided by the U.S. Army Corps of Engineers (Corps) St. Paul District. To the extent that these reports may be beneficial to EPA staff in developing the new rule, they are available on the Section 404 Assumption page of the BWSR website at: http://www.bwsr.state.mn.us/wetlands/index.html

In general, we believe the new rule should clarify issues that have been identified over the years (such as the extent of assumable waters), address the applicability of and interaction with other regulations (such as the Compensatory Mitigation Rule), and focus on ensuring adequate protection of our nation's water resources, leaving more detailed procedural and implementation issues to the states electing assumption. The regulations should allow sufficient flexibility, allowing states with programs that meet threshold criteria to assume Section 404 responsibilities with little to no procedural changes. Following are our specific comments:

Extent of Assumable Waters

We agree with the Assumable Waters Subcommittee majority recommendations to clarify which waters the Corps would retain, and thus conversely which waters a state could assume, if it elects to assume the 404 program. This includes the recommendation that Corps-retained waters be limited to those waters regulated under Section 10 of the Rivers and Harbors Act of 1899 (other than those listed for historic use only) and adjacent wetlands. Of particular importance is the recommendation to establish an administrative boundary for Corps-retained wetlands, and allowing states to establish that boundary consistent with other existing state regulatory authorities/boundaries. The Corps agreed to these

recommendations in its July 30, 2018 memorandum on retained waters.

For states like Minnesota, uncertainty regarding the extent of waters that are assumable and the process used to identify them has been one of the most significant barriers to assumption. Minnesota's 2018 Analysis of Retained and Assumable Waters concluded that, under the Corps' previous interpretation of retained waters, the vast majority of waters and wetlands in Minnesota would be retained by the Corps. In addition, a case-by-case review of waters, particularly wetlands, would often be required just to determine if a water was retained or not, thereby eliminating many of the procedural efficiencies to be gained by assumption. While this analysis was based on a previous interpretation of Corps-retained waters, it underscores the importance of addressing this issue in rule. We urge EPA to adopt the Subcommittee's majority recommendations.

For any post-assumption changes to the Section 10 list, the Corps should follow the formal designation process for listing Section 10 waters and coordinate with the state well in advance.

Establishment and administration of state regulatory programs

Minnesota has well-established and comprehensive water and wetland regulatory programs, administered by three state agencies. Specific to wetlands, the State Board of Water and Soil Resources (BWSR) is responsible for administration of the Minnesota Wetland Conservation Act (WCA), including establishment of the WCA rules (MN Rule Chapter 8420), development of application forms and procedures, and administration of the State wetland bank. The WCA rules are implemented primarily by local government units (LGUs) consisting of political subdivisions of the State (counties, Soil and Water Conservation Districts, and cities), with BWSR oversight. In addition to establishing rules and procedures, BWSR oversight includes application review and comment through the State Technical Evaluation Panel (similar to the Federal Interagency Review Team but with additional authority), the ability to halt program implementation for non-performing LGUs, the ability to appeal all LGU decisions, and having ultimate decision-making authority to hear and decide on appeals (under State law, a decision is not final until a decision has been made on an appeal or the appeal window has closed).

This model of shared state-local responsibility has been extremely important to the successful implementation of WCA. It allows for the implementation of state law in conjunction with local land-use authorities, including building permits, septic systems, zoning, and other local authorities. It results in several hundred LGU staff trained in wetland science and policy "on the ground," reviewing the activities of landowners. Not only is this model successful in assuring awareness of activities affecting wetlands and providing for effective avoidance and minimization of resource impacts early in the process, but it is also responsive and efficient for landowners. The entire WCA is structured around this model of shared state-local responsibility. Requiring significant changes to this model could prove to be a difficult barrier to 404 assumption in Minnesota.

Under WCA, the specific regulatory standards and requirements are developed by the State and established in fairly prescriptive state statutes and rules. LGUs must implement them as prescribed by the State and with state review and oversight, and they do not have authority to modify or deviate from them. Because the State is responsible for the establishment and administration of the WCA rules, including the retention of ultimate decision-making authority, and the State has demonstrated adequate authority to carry out the regulatory program, we believe this model is consistent with the intent of the statute governing Section 404 assumption. We strongly encourage EPA to modify the 404 Assumption Regulations to clarify that a state-local model is allowable provided it meets federal standards. We would also welcome the opportunity to discuss the specific details of Minnesota's wetland regulatory structure further with EPA as we continue to explore 404 assumption. Aside from

assumable waters, this may be the single most important factor affecting the feasibility of 404 assumption in Minnesota.

Permit application procedures

We understand the need for having included specific procedural requirements in the previous regulations, which originated in 1988 when fewer comprehensive state regulatory programs existed. However, thirty years later, states like Minnesota have well-established regulatory programs with a track record of successful implementation. To the extent allowable by statute, we urge EPA to reduce the number of specific process requirements in the current rule (e.g. noticing, publication in newspapers, review periods, etc.) and instead establish key minimum standards that focus on and ensure the desired outcome (e.g. "states shall ensure transparency by adopting procedures to provide for the effective public notice of applications...").

The 404 assumption regulations should allow EPA to recognize pre-established and effective state programs, and allow such states to use their existing, effective processes. Overall, the new rules should focus on ensuring that states and tribes have 1) standards for protection that are at least equivalent to federal standards, and 2) the capability to implement them. Procedural issues should largely be left for the states to develop and implement (or, for states with existing programs, address through existing procedures if they are sufficient to meet the key federal minimum standards designed to ensure the desired outcome). Such an approach would be consistent with our understanding of the intent of 404 assumption – to ensure protection of our nation's waters while utilizing state programs and procedures that can be tailored to the circumstances of individual states.

Applicability of the Federal Mitigation Rule

We recommend that EPA consider clarifying the applicability of the Federal Mitigation Rule (40 CFR Part 230) for a state-assumed program, most importantly with respect to the role of the Corps in the review and approval of mitigation banks and in-lieu fee (ILF) projects. We view the establishment and oversight of mitigation sites as an inseparable part of a permitting program that should be the responsibility of the state if it can demonstrate, to EPA's satisfaction, that the program as a whole provides an equivalent level of protection for aquatic resources. In a state like Minnesota with a significant number of wetland banks, a scenario where the state assumes permitting approval but not the responsibility for review and approval of wetland banks would complicate decision making processes and retain a system of redundant state and federal mitigation bank reviews.

Separating the decision authority for the impacts from the decision authority for establishing the corresponding mitigation would be illogical and contrary to the goals of compensatory mitigation. In addition, under an assumption scenario, a dual decision authority (by the Corps and state) on the same project could create complications as the state's decision would already convey Section 404 authority.

For state-sponsored ILF programs, we acknowledge that federal oversight is required to satisfy the requirements in the Federal Mitigation Rule, but we encourage EPA to clarify that the oversight would be provided by the EPA in the event of state assumption (rather than the Corps).

EPA should also clarify whether the Interagency Review Team (IRT) exists under a state-assumed program and, if so, how it would function, including for the review of banking and ILF projects. As we understand it, if the IRT exists under a state-assumed program, the state would chair it for banking and ILF projects, as well as for activities proposing wetland impacts.

Effective date of an approved state program

For most states, at least some changes to state statute or rule would be necessary to assume Section 404. Legislators may be hesitant to make such changes to state statute if they do not know that, with those changes, EPA will approve state assumption. Allowing EPA to approve an assumed program contingent on specific statute changes at the state level would provide greater certainty to legislators and simplify the assumption process (rather than the state having to change statute before they even know if the program would be approved by EPA).

Similarly, it may take a state some time to hire additional staff and fully prepare to implement a new or revised regulatory program. It may be helpful to states to clarify that an EPA approval can allow for a phased-in state implementation plan and/or a specified future date on which the state-assumed program takes effect.

Partial assumption

Federal statute does not appear to prevent partial assumption. Minnesota supports allowing partial assumption as long the state/federal authorities are clearly defined and understandable to the public. If partial assumption were pursued in Minnesota, one possible scenario could be to separate authority based on resource type (i.e. wetlands vs. lakes and streams). We also see advantages to some states assuming authority based on the type of activity, or, conversely, the Corps retaining authority over certain activities based on an agreement with the state. The parameters upon which partial assumption is based should be flexible to account for differing situations among the states.

Enforcement authority

The current regulations include specific requirements for enforcement authority, but allow EPA to accept alternate state programs that lack the specific penalty levels but are demonstrably effective nonetheless. Minnesota has several civil and criminal enforcement mechanisms available for violations of state water and wetland laws. While those enforcement mechanisms are not entirely consistent with the specific requirements of 40 CFR 233.41, they have been shown to be effective in achieving compliance. Similar to our comments on permit application procedures, we urge EPA to establish specific requirements only for key enforcement minimum standards, focusing instead on the desired outcome of adequate state enforcement authority, however that may be structured in a given state. The ability for EPA to accept alternate but demonstrably effective enforcement authorities should also be maintained.

MOA with Corps

Assuming the new regulations clarify the assumable waters issue, the Memorandum of Agreement (MOA) between the state and the Corps becomes less essential to the state program approval process. EPA could consider moving some of the elements of the state-Corps MOA to the state-EPA MOA, and/or separating the state-Corps MOA from the program approval process. At a minimum, EPA should clearly define Corps-retained waters consistent with the majority recommendation of the Assumable Waters Subcommittee, and establish a dispute-resolution process to resolve disagreements between the state and Corps.

An agreement between the state and the Corps would also be the most logical place to address projects that cross the state-Corps administrative boundary for wetlands, the use of wetland banking or In-Lieu Fee credits across agency lines, and other general coordination issues.

EPA oversight

State autonomy and the ability of voters to affect state government is extremely important. However, implementation of a state-assumed Section 404 program must be a partnership with the federal government. Accordingly, section 404 assumption should not be used a vehicle for states to diminish federal protections for the nation's water resources. We support effective EPA oversight of state-assumed programs, particularly in regards to state statute changes that would be inconsistent with the Federal Clean Water Act. EPA's oversight should focus on ensuring that a state-assumed program is designed and subsequently implemented in a way that ensures adequate standards for protection, leaving flexibility on procedural issues where that flexibility does not undermine minimum national standards for protection.

Costs and benefits of 404 assumption

At the December 6, 2018 meeting held by EPA to solicit input from the states regarding updates to the 404 assumption regulations, feedback was requested on calculating the costs and benefits of the rule. Chapter 3.7 of the "Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study" (January 2017) discussed the estimated costs and savings of 404 assumption that would accrue to various levels of government. That analysis concluded that there would be:

- increased costs to the state for implementation of an assumed program, primarily for staffing (the actual amount of increase for Minnesota could vary significantly depending on the implementation scenario and the extent to which our current implementation model is viable under 404 assumption);
- savings to the Corps in an amount equal to the value of work that would become the responsibility of the state; and
- savings to local governments as project sponsors due to faster permitting timeframes and reduced redundancy by not having to prepare separate state and federal permit applications and devote staff time to separate permit processes.

As an example of savings to local government project sponsors, the report cited an analysis conducted by the St. Louis County (Minnesota) Public Works Department in 2013 that reviewed the permitting process for five selected transportation projects in the county. They concluded that project delays associated with the Section 404 permitting process resulted in a cumulative increased cost of at least $500,000, with no changes to the original project plans.

Some non-governmental project sponsors should also realize cost savings due to improved timeframes and reduced redundancy. These savings correlate both to direct costs relating to permitting, and to indirect costs including opportunity costs.

Endangered Species Act coordination

The EPA should clarify the scope of the Endangered Species Act (ESA) coordination with the USFWS in 40 CFR 233.50. Currently, the EPA is not allowed to waive review of applications where the discharge would have a reasonable potential for affecting federally listed species as determined by the USFWS. The statutory basis for this requirement is unclear, which may at least partially contribute to confusion over the path by which potential adverse effects would be dealt with under the ESA (Section 7 vs Section 10).

The current regulation is silent with respect to what coordination is required with EPA and/or the USFWS if they determine there is the potential for an effect on a federally-listed species. It is unclear whether a process where USFWS would work through the EPA to the State and then to a landowner to address such a situation would be efficient from a procedural standpoint. It also is questionable whether such coordination would conclude with something as simple as inclusion of a permit condition. Therefore, EPA should provide greater clarity with respect to the applicability of 40 CFR 233.50 and, for any required review, the process, roles, timelines, and outcomes associated with such reviews of applications that involve potential effects to federally listed threatened and endangered species. Minnesota fully supports protections for federally-listed species and recommends that any revised assumption regulations maintain an effective ESA review process, but the procedures and responsibilities should be clear and efficient. We recommend that any such clarifications be discussed with the states during the rulemaking process.

Miscellaneous Comments

Section 404 statutes and rules (40 CFR 233.50) prescribe deadlines for the federal review and objection of permit applications under assumption. While the statutory timelines are generally maximums, the agency could ostensibly establish shorter timelines for certain actions. Section 404 permitting timeframes are of significant concern to applicants and stakeholders, and improving those timeframes is a major motivation of those who support 404 assumption. Based on our experience in Minnesota, applicants are much more likely to accept regulation if they are afforded a fair and efficient process. Therefore, we recommend that EPA consider shortening federal review periods where feasible. For example, notifying the state of EPA's intent to comment on an application in 15 days or less (rather than the statutory 30 day maximum timeframe) would help maintain a more timely, efficient process for the majority of applications.

Annual reporting requirements for state-assumed programs are described in 40 CFR 233.52 of the current rule. We agree that states administering an assumed program should report implementation data to EPA. However, EPA should consider removing unnecessary or subjective information requirements and simplifying the report development, review, and submittal process.

We appreciate EPAs commitment to work cooperatively with the states to update the 404 assumption rules. Involving the states early in this process will not only convey ownership to those who participate, but will undoubtedly result in a better rule. We would be happy to discuss these comments or other issues with your or your staff. Please contact Les Lemm, BWSR Wetlands Section Manager, at les.lemm@state.mn.us or 651-296-6057 if you have any questions or would like to discuss further. We look forward to continued state-federal cooperation and coordination as the new rule is developed.

Sincerely,

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Executive Director

Minnesota Board of Water and Soil Resources

Barb Naramore,
Assistant Commissioner

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Minnesota Pollution Control Agency

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